

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter)	
)	
PAGING SYSTEMS, INC.)	DA 12-1131
and)	
MARITIME COMMUNICATIONS/LAND)	PSI Call Signs: KYW912, WHW826,
MOBILE LLC)	WQA212, WQA216, WQA221,
)	WQA227
Requests to Find Automatic Termination of)	
Licenses (System Authorizations and)	
Component Stations))	MCLM Call Sign: WRV374

**PETITION FOR RECONSIDERATION,
AND SECTION 1.41 REQUEST ***

Under 47 C.F.R. §§ 1.106 and 1.41, Warren C. Havens (“Havens”), Skybridge Spectrum Foundation (“Skybridge”), Environmental LLC (“Environmental”), Intelligent Transportation and Monitoring Wireless LLC (“ITM”) (collectively “Petitioners”) hereby petition the Wireless Telecommunications Bureau (“Bureau” or “WTB”) for Reconsideration of its Order adopted July 13, 2012 and released July 16, 2012 in the above-captioned proceeding (the “Order”)¹ and for Commission action to recognize the automatic termination of and to cancel the above captioned AMTS authorizations of Maritime Communications/Land Mobile LLC Debtor in Possession (“MCLM” or “MCLM DIP”)² and Paging Systems, Inc. (“PSI”).³

¹ *Order*, DA 12-1131, released July 16, 2012.

² Since the filing of the Section 1.41 Request against Call Sign WRV374, the license has been assigned to MCLM DIP. Herein, MCLM DIP and MCLM each mean MCLM DIP.

³ If any part of the instant petition for reconsideration is considered by the Bureau to contain new facts and substance not proper for a petition for reconsideration, then Petitioners asked that any said new facts and substance be considered under Section 1.41 for the same reasons given in Petitioners’ requests under Section 1.41 that are subject of the Order, including, but not limited to, that their consideration is in the public interest.

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Summary and Preliminary Statement. Petitioners agree that the Bureau has jurisdiction and an obligation to have decided on the Requests, and for the reasonably timely action on the Requests. Petitioners request immediate action upon this petition for

reconsideration for the same reasons given for expedited action in the Requests, further stated herein. Petitioners present a relevant background of AMTS and other information below, as a foundation of this pleading, drawing largely from FCC decisions.

In the Order: The Bureau erred in detaching its rational^e from and ignoring (i) the sole purpose of the creation of the AMTS radio service: continuity of coverage-service under multi-station system authorizations, and (ii) from virtually all past substantive rule-making and license adjudication Orders on AMTS that stated or reflected this sole purpose. The Bureau erred in treating MCLM's and PSIs' AMTS system authorizations as independent stations authorizations. The Bureau erred in distinguishing between "construction" and "coverage" and related matters, including suggesting that an rule section 80.475(a) (prior to deletion of the part containing the continuity of service requirement) use of "service" does not include service-area "coverage." The Bureau erred and exceeded its authority in concluding that automatic termination provisions of section 1.946(c) do not apply to "Pre-2002" (defined below) AMTS system authorizations (licenses) and component stations. The Bureau erred in failing to find automatic termination of MCLM's and PSI's licenses (system authorizations). The Bureau erred in failing to provide a reasoned basis for its decision. The Bureau erred in neglecting to address Petitioner's arguments that MCLM and PSI, and their subject system authorizations (licenses), failed to meet coverage requirements under section 80.475(a). The Bureau acted in a manner contrary to the public interest, in violation of the core licensing mandate under the Communications act, including 47 USC §309, especially given Petitioners' demonstration of major current public railroads requirements for said FCC action in the public interest. The Bureau's Order violates Petitioners' equal protection rights, and improperly avoids the facts and arguments Petitioners presented on this matter in their Requests. To the degree the Bureau finds cause to not process and decide

upon an item presented herein (such as on deeming any item to be new to what was presented in the Requests), then Petitioners asks for processing and decision under rule section 1.41. For the above and other reasons given herein, the relief requested in the Request^s should be promptly granted.

Further, decision on this petition for reconsideration should be rendered as to the subject PSI system authorization (and component stations) promptly and without consideration of the affects of the decision upon MCLM (the Order footnotes that MCLM is subject to a formal hearing in which its AMTS licenses are at issue):⁴ Petitioners have a right to that decision in no less than 90 days under 47 USC §405 even not considering the good causes given for expedited action which justified a decision in substantially less than 90 days. This called-for decision as to the PSI systems authorizations (and component stations) must be uniformly applied in substantially the same circumstances, and Petitioners demonstrated in the Requests that substantially the same circumstances apply to the subject MCLM AMTS system authorization (and component stations). Accordingly, the decision should be made at the same time as to PSI and MCLM, not deferring action as to MCLM for consideration of the Hearing under FCC 11-64. While the Order would not have been issued as to MCLM had the Bureau believed it would conflict with the Hearing, Petitioners present the above paragraph to demonstrate why a decision that must be made as to PSI practically will be made as to MCLM also, as a controlling precedent, ~~even if not applied in the decision to MCLM~~. And thus, ~~why~~ for FCC staff efficiency

⁴ In this regard, Bureau decisions on PSI and MCLM (and other ^{processing of} entities) ^{state} affirm that its action on one licensee's licensing matters generally does not affect even like matters of another licensee. While in cases, Petitioners disagree, this Bureau practice cannot reasonably or equitably be made in support of PSI and MCLM (as they requested), but not extended to the Requests and this petition for reconsideration. Thus, this pleading should either decided on promptly as to PSI, without dealy due to the MCLM Hearing, or decided for both PSI and MCLM at the same speed, as we believe is required.

and the other public interest reasons given herein, the decision must be made at the same time for PSI and MCLM (as to their subject AMTS authorizations involved).

Exhibit 1 hereto supports the text of this pleading and is referenced and fully incorporated herein.

BACKGROUND

Petitioners own Automated Maritime Telecommunications System (“AMTS”) geographic licenses for providing service to the Atlantic Coast, including the Northeast corridor. Petitioners’ core business is wireless for Intelligent Transportation Systems (“ITS”) which includes Positive Train Control (“PTC”) for railroads. Maritime Communications/Land Mobile LLC (“MCLM”) and Paging Systems, Inc. (“PSI”) hold incumbent AMTS license system authorizations along the Atlantic coast.. Petitioners’ AMTS stations surround the alleged-valid Northeast AMTS incumbent license system authorizations owned by PSI and MCLM. To make their AMTS spectrum available for railroads and other uses in the Northeast corridor, Petitioners must provide spectrum unencumbered by other AMTS stations in the Northeast corridor. To provide unencumbered spectrum, Petitioners are attempting to remove artificial encumbrances by MCLM and PSI’s AMTS incumbent license system authorizations in this region. In conducting due diligence on MCLM and PSI’s stations, Petitioners learned that MCLM and PSI had not met the construction-coverage requirements of the FCC’s rules applicable to AMTS incumbent license system authorizations. Specifically, MCLM and PSI failed to provide overlapping radio service-contour coverage in the Northeast corridor by the applicable deadlines (and in certain cases, to construct stations timely or at all).⁵ Through PSI’s and MCLM’s own admissions, and

⁵ See Exhibit 3 to Request to recognize automatic termination of Paging Systems, Inc’s site-based AMTS licenses along the Northeast Corridor blocking Petitioners co-channel geographic

Petitioners' repeated requests for the actual technical operating parameters for the component stations of the AMTS incumbent license system authorizations, under Sections 80.385(b), 80.70, and FCC Orders DA 09-793 and DA 10-664, and through the FCC hearing, FCC 11-64, and Petitioners' New Jersey court suit against MCLM and PSI and other factual findings, Petitioners discovered that PSI and MCLM maintained no records showing actual operation of their AMTS stations, describing the location of their equipment, or evidencing leases or provisioning of service to customers.⁶

On October 13, 2011, Petitioners filed an Informal Request per Section 1.41, asking that the Commission find that PSI's licenses for operation of its AMTS stations in the Northeast corridor were invalid under Section 80.49(c) and therefore automatically terminated per Section 1.946(c) and other Commission rules and precedents, and reverted to Petitioners under Section 80.385(c) due to PSI's failure to meet the construction-coverage requirement for AMTS licensees in Section 80.475(a).⁷ Petitioners filed a similar request for Commission recognition of automatic termination of MCLM's licenses for failure to meet the construction-coverage requirements on November 1, 2011 ("Requests").⁸ On July 16, 2012, the Bureau

AMTS licensed spectrum including its provision responsive to railroads request for PTC systems under Congressional mandate (filed October 13, 2011) ("PSI Request") and Exhibit 3 to Request to find automatic termination of Maritime Communications/Land Mobile LLC's Site-Based AMTS licenses to serve the Atlantic Coast blocking Petitioners co-channel geographic AMTS licensed spectrum including its provision responsive to railroads' request for PTC systems under Congressional mandate (filed November 1, 2011) ("MCLM Request") for construction deadlines.

⁶ See e.g. Exhibit 2 to MCLM Request; and PSI's responses to the FCC regarding its WQA216 station in the NUSCO Section 80.385(b) proceeding.

⁷ See PSI Request. PSI filed an opposition on October 26, 2011. Environmental and Skybridge filed a reply on November 7, 2011.

⁸ See MCLM Request. Petitioners filed an errata version on November 2, 2011. Citations will be to the errata version. MCLM filed an opposition on November 17, 2011. Petitioners filed a reply on November 28, 2011.

released an order denying the Requests. The WTB concluded that MCLM and PSI were under no obligation to provide continuity of service to meet their construction⁹ and coverage duties under Section 1.946(c).⁹ To reach this conclusion, the Bureau found that “Prior to 2002, AMTS stations were licensed on a site-by-site basis.”¹⁰ “Pre-2002” (see footnote below for discussion of “pre-2002” meaning), site-based system authorizations (if the licensee requested a two-year period) were subject to a two-year construction requirement under Section 80.49(a)(3).¹¹ Failure to meet this construction requirement would result, under Section 1.946(c), in automatic termination of the station, without specific Commission action at the construction deadline.¹² The Bureau found, however, that failure to provide continuity of service, as required under Section 80.475(a), would not result in automatic termination because, for site-based system authorizations, continuity of service was not a “coverage requirement” that could trigger automatic termination for failure to comply.¹³

ARGUMENT

The Bureau Erred in Treating MCLM’s and PSI’s AMTS Authorizations as Independent Station Licenses, Rather than as System Authorizations

The Bureau’s flawed conclusion relies upon the equally flawed premise that prior to 2002, AMTS station licenses were awarded on a “site-by-site” basis. In fact, AMTS service was not licensed on a site-by-site basis. The very term “AMTS” reveals the defect in the

⁹ *In the Matter of Paging Systems, Inc. and Maritime Communications/Land Mobile LLC Requests to Find Automatic Termination of Licenses*, Call Signs KYW912, WHW826, WQA212, WQA216, WQA221, WQA227, and WRV374, Order, DA 12-1131 at para. 5 (Rel. July 16, 2012) (“Order”).

¹⁰ Order at para. 2.

¹¹ 47 C.F.R. § 80.49(a)(3)(2001).

¹² Order at para. 4; 47 C.F.R. § 1.946(c).

¹³ Order at para. 5.

Bureau's position. AMTS is a system. To provide AMTS service, a series of stations are required.¹⁴ AMTS was created solely as a maritime radio communications service for covering long waterways (ones that required at least two stations to be covered) with a system of multiple base stations or cell sites, with overlapping continuous coverage and end-user service. This was described in the first AMTS Report and Order, in which Section 80.475(a) was enacted to require continuity of coverage and service.¹⁵ Each station has validity only as part of the system authorization, and has no independent validity. Applying for single stations was barred, and those applications were denied by the FCC in various orders.¹⁶

The FCC has repeatedly confirmed that AMTS operates as a system of integrated stations. For example, in its AMTS Freeze Order, the Commission clarified:

Because an AMTS licensee must provide continuity of service to its service area, which entails a system of stations, we typically grant authorizations for each station in the system on the same date. Currently, AMTS stations must be placed in operation within eight months from when the license is granted, but licensees often have found eight months to be insufficient to construct an *entire system*, and have routinely requested additional time, up to two years. The Commission proposed in the Second

¹⁴ Section 80.475(a) refers to "each station" in a "proposed system". 47 C.F.R. § 80.475(a).

¹⁵ *In the Matter of Amendment of Parts 2 and RM-5712 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS)*, First Report and Order, 6 FCC Rcd. 2 at para. 22 (1991) ("First AMTS Order"); *See also In re Applications of Fred Daniel d/b/a Orion Telecom and Paging Systems, Inc. For Authority to Construct New Automated Maritime Telecommunications Systems at Miami, Florida; New Bern, North Carolina; Suffolk, Virginia; Baltimore Maryland; Newark, New Jersey; New York, New York; Oak Hill, Florida; Rehoboth, Massachusetts; Spaulding, Florida; Balm, Florida; and Raymond, Maine*, Memorandum Opinion and Order, 11 FCC Rcd. 5764 at n. 1 (1996) ("The AMTS provides automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system, including non-voice services, for vessels to use as they move along a waterway. AMTS offers improved services over those available from individual public coast stations").

¹⁶ *See e.g. the In Fred Daniel d/b/a Orion Telecom (Orion)*, the Commission determined that not only could an AMTS system not be authorized for coverage over only land but that many eligible persons in communities, including Denver, Colorado; Henderson, Nevada; Yuma, Phoenix, and Tucson, Arizona; and El Paso, Ft. Worth, and Dallas, Texas could not obtain AMTS service because only one coast station would have been required for each community, 14 FCC Rcd 19912 (1999).

Further Notice to extend the construction period to two years for each station within a new AMTS system and one year for subsequently licensed stations that extend an existing system's service area (a "**system extension**"), with no construction requirements for fill-in stations.¹⁷

In the Freeze Order, the Commission also confirmed that the original purpose of AMTS was to provide interconnected marine communications systems.

Presently, each AMTS **must provide continuity of service** to either a substantial navigational area along a coastline or sixty percent of one or more inland waterways (except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety). **This requirement reflects the original purpose of AMTS service**, which was to **authorize and provide radio frequencies for automated, interconnected marine communications systems** that would provide commercial vessels moving along a waterway with **more convenient service than was available from individual public coast stations**, by, e.g., relieving them from having to repeatedly change frequencies and contact new coast stations (which may have different call set-up and billing procedures).¹⁸

The Commission clearly declared that it aimed to create a cellular system for maritime.¹⁹

¹⁷ *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications Petition for Rule Making filed by RegioNet Wireless License, LLC*, Fourth Report and Order and Third Further Notice of Proposed Rulemaking, FCC 00-370, 15 FCC Rcd 22585, para. 16 (2000) ("AMTS Freeze Order") (emphasis added).

¹⁸ AMTS Freeze Order at para. 38 (emphasis added); *see also id.* at n. 266 ("We note that AMTS stations are licensed only as part of a system, and that ordinarily each station is the subject of a separate application. ... That is, we will suspend processing of all of the applications for the proposed system if the non-mutually exclusive applications cannot be granted without the suspended mutually exclusive applications because the partial system would not provide the required **coverage**, *see* 47 C.F.R. § **80.475(a)**...) (emphasis added). The FCC made clear that the rules applied to licensees, not only applicants. *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications Petition for Rule Making filed by RegioNet Wireless License, LLC*, Second Memorandum Opinion and Order and Fifth Report and Order, 17 FCC Rcd. 6685 at para. 22 (2002) ("AMTS licensees must provide continuity of service to either a substantial navigational area along a coastline; or sixty percent of one or more inland waterways, except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety, and waterways small enough to be served by a single station are not eligible for AMTS service.") (emphasis added). Additional support is included in Exhibit 1, attached hereto and incorporated by reference.

¹⁹ First AMTS Order at para. 3.

Cellular service requires a system of overlapping coverage to provide continuity of service in a given region. While AMTS licensees were required to obtain system authorizations to operate individual stations in the system, the individual stations were not the target of the license. Rather, AMTS authorizations were secured to provide a continuous service via a series of stations. To apply for an AMTS license system authorization, an applicant must specify the sites for continuous coverage in a given region.²⁰ The application is not an independent site application for a single facility. Instead, an applicant applies for authorization to operate an AMTS system of coordinated stations.²¹ As a result, AMTS licensure has never been site-based as the Bureau posits.

The Bureau Erred in Distinguishing Between “Construction” and “Coverage”

Implicitly in its order, the Bureau recognizes that AMTS system operators were required to provide continuity of service.²² The Bureau, however, found that failure to provide the required continuity of service would not result in automatic termination for AMTS licensees. To reach this conclusion, the Bureau distinguished between “construction” and “coverage.” Only failure to meet “construction” requirements for each facility could result in automatic termination

²⁰ See 47 C.F.R. § 80.475(a).

²¹ Moreover, AMTS construction, and construction deadlines, applied to construction of the system. The system had to be constructed by the deadline for the component stations. If the FCC granted a system application, it would state the construction deadline for the system that applied to each component station. This is shown in the FCC records of the subject MCLM and PSI AMTS system authorizations, and in various orders, some included in Exhibit 1 hereto. If a station required for the system was not timely constructed, then the system construction failed, and the system authorization automatically terminated, and each component station failed and automatically terminated. If a station that was granted but not required for the system-authorization continuity of coverage-service (redundant coverage) was not timely constructed, then only that station automatically terminated. That an AMTS authorization is for a “system” (not individual stations) is further supported by multiple FCC decisions on AMTS, including the decision against the Havens Texas and Arkansas Headwater applications. See Exhibit 1.

²² See Order at para. 2 (citing 47 C.F.R. § 80.475(a) (2001)).

under Section 1.946(c). This conclusion is wholly at odds with the nature of AMTS service. AMTS is a system, one which relies upon individual facilities, but which cannot operate without continuity of coverage along an applicant-defined (and FCC-accepted) waterway (in this case the entire Atlantic Coast). Even assuming that component stations within the AMTS system met the FCC's construction obligations under Section 80.49(a)(3), the system could not operate as intended by the Commission without continuity of service. Individual stations cannot provide continuous interrupted service in a region. To provide customers with AMTS, there can be no gaps in service. Otherwise, the entire system fails. Failure to build any single station that is required to provide continuity of coverage requires the license holder to turn the system authorization in to the Commission for cancellation.²³ Therefore, station construction alone cannot define an AMTS licensee's threshold obligations under FCC rules.

The FCC's orders clearly demonstrate that continuity of service means coverage; they are one and the same.²⁴ "Continuity of service" implies and requires "coverage" since service cannot be provided without coverage. Section 80.475(a) requires actual continuity of "service." Service is the radio communications service provided to end users, which requires

²³ Only if a station is redundant could failure to construct a single station not result in a failure of the entire system requiring automatic termination of the AMTS authorization.

²⁴ *Amendment of the Commission's Rules Concerning Maritime Communications*, Second Memorandum Opinion and Order and Fifth Report and Order, PR Docket No. 92-257, 17 FCC Rcd. 6685, 6718, para. 79 (2002) (Fifth Report and Order), *recon. granted in part. denied in part*, Third Memorandum Opinion and Order, 18 FCC Rcd. 24391, 24400-01 para. 23, n. 84 (2003) ("[T]he Commission eliminated the continuity of service requirement [in] the *Fifth Report and Order*" by amending Section 80.475(a), and the FCC "did not require incumbent AMTS licensees seeking to partition spectrum to maintain any minimum area of coverage, or otherwise condition approval of partitioning requests on continued conformance with former Section 80.475(a)") (emphasis added); *See also In the Matter of Maritel, Inc. and Mobex Network Services, LLC, Petitions for Rule Making to Amend the Commission's Rules to Provide Additional Flexibility for AMTS and VHF Public Coast Station Licensees*, Report and Order, FCC 07-87 at para. 11, n. 53 (2007).

radio "coverage." Because continuity of service and coverage are interchangeable, the Bureau erred in finding that Section 1.946(c), which imposes automatic termination for failure to meet "construction" or "coverage" obligations, is not triggered by lack of "continuity of service."

The Bureau Erred and Exceeded its Authority in Concluding that Automatic Termination Provisions of 1.946(c) Do Not Apply to "Pre-2002" AMTS Licenses

The Order asserted that "Prior to 2002, AMTS stations were licensed on a site-by-site basis."²⁵ The Bureau reasoned that under Section 1.946(c), AMTS incumbent system stations licensees[✓] were subject to automatic termination only if they failed to construct. Failure to provide continuity of service did not qualify as ~~a~~ "coverage requirement~~s~~," non-compliance ~~with~~ which would result in automatic termination. First, because AMTS was not licensed on a site-by-site basis "pre-2002" (see immediately above footnote), the Bureau's conclusion is erroneous. The Bureau's logic that failure to provide continuity of service does not result in automatic termination under Section 1.946(c) is limited to site-based licenses. For the reasons discussed above, AMTS is not site-based. As a result, failure to provide continuity of service with a system of stations triggers the automatic termination provisions for AMTS licensees.

Absent a finding that failure to provide coverage as required by Section 80.475(a) results in automatic termination, the Bureau has improperly degraded a Commission rule to a mere guideline. Effectively, the Bureau read any penalty for failure to meet the coverage (or continuity of service) requirement imposed by Section 80.475(a) out of the rules. Absent a

²⁵ The Order does not identify the source of this assertion. However, Petitioners note that in year 2000 the Commission suspended further site-based AMTS system licensing in the Fourth R&O, and Third FNPRM, FCC 00-370. In the Fourth R&O, and Third FNPRM, FCC 00-370, the Commission suspended AMTS waterway system licensing because the Commission in that Order proposed to adopt geographic licensing. However, for purpose of this pleading, Petitioners use the term "pre-2002" to represent what the quoted allegation asserts that in ~~a~~ certain year^s the Commission licensed AMTS stations on a site-by-site basis.

penalty for non-compliance, the Commission's coverage rule effectively operates as a mere recommendation.²⁶ The Bureau has no authority to create new rules or act in contravention to existing FCC rules and the purposes of a particular radio service created by those rules. The Bureau's authority is limited. While the FCC has authority to delegate certain responsibilities to the Bureau,²⁷ those responsibilities cannot be exercised in contravention of FCC rules, policies and orders.²⁸ Likewise, the Bureau cannot itself initiate a rulemaking or create substantive rules. 47 C.F.R. §§ 0.131, 0.331. Furthermore, the Bureau is not entitled to

act on any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines. 47 C.F.R. § 0.131(a)(2).²⁹

²⁶ There is no meaning to a rule requirement, and rule of law under due process, if, as a result of failure to meet the requirement, the rights sought under the rule ~~cannot~~ be obtained or maintained. It is clear that the coverage-service obligation was a requirement, and failure to comply would terminate rights to the license. Section 80.745(a) provided that "AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service along more than 60% of each of one or more navigable inland waterways...AMTS applicants proposing to serve portions of the Atlantic, Pacific or Gulf of Mexico coastline must define a substantial navigational area and show how the proposed system will provide continuity of service for it." 47 C.F.R. § 80.475(a). The FCC intentionally adopted this rule as a requirement for all AMTS applicants, and the FCC made it clear that it also applied to AMTS licensees (there is no meaning to a rule apply only at the application stage, but not at the real world licensing stage). See various FCC decisions, including, but not limited to, the 1991 Nationwide Order, and FCC 02-74 and AMTS Freeze Order, FCC 00-370. Had the FCC intended to make continuity of service optional, it would not have used the term "must" and instead, would have substituted the word "should." See, e.g., *Pac. Bell Tel. Co. v. California Pub. Utilities Comm'n*, 621 F.3d 836, 848 (9th Cir. 2010) cert. denied, 131 S. Ct. 3050 (2011) ("In general, the plain meaning of an administrative regulation controls.").

²⁷ 47 U.S.C. § 155(c); 47 C.F.R. § 0.91.

²⁸ As an entity with delegated authority, the Bureau must abide by the rules of its governing agency, the FCC.

²⁹ A delegation of authority from the full Commission to an official or group thereof must be within the clear scope of the rule delegating specific tasks and responsibilities to the delegate. *800 MHz Specialized Mobile Radio Service*, Second Memorandum Opinion & Order on Reconsideration, 14 FCC Rcd. 21068, ¶ 5 (1999). While the Commission can delegate authority to subordinate entities, the Commission must retain ultimate authority and responsibility for FCC rules and their enforcement. *Southwest Pennsylvania Cable TV, Inc. v. FCC*, 514 F.2d 1343

First, the FCC has never before concluded that an AMTS licensee's failure to provide continuity of service does not subject it to automatic termination under Section 1.946(c). As a result, in its ruling, the Bureau acted on a novel question of law and fact, which it has no authority to consider.³⁰ Thus, the Bureau's decision was *ultra vires* and cannot survive scrutiny under the Administrative Procedure Act ("APA"). Moreover, the Bureau's reading a penalty for failure to provide continuity of service out of the rules effectively creates a new substantive rule because it set a policy that has a material impact on the rights and duties of AMTS licensees—the impact of failure to provide continuity of service.³¹ The Bureau has no authority to initiate rulemakings and adopt substantive rules, and thus it exceeded the scope of its authority in exempting AMTS licensees from automatic termination for failure to provide continuity of service.³² As such, the Bureau's "rule" is invalid.

**The Bureau Erred in Failing to Find Automatic Termination of MCLM's and
PSI's Licenses (System Authorizations)**

Second, even accepting the Bureau's argument, MCLM's and PSI's licenses must be found to have automatically terminated. Ignoring Section 1.946(c), automatic termination

(D.C. Cir. 1975). The Commission has recognized that it must have the ultimate review of any matters delegated that are within the FCC's authority. *United Utilities, Inc.*, Memorandum Opinion & Order, 59 Rad. Reg. 2d (P&F) 1161, ¶ 6 (1986).

³⁰ 47 C.F.R. § 0.331(a)(2).

³¹ That is, the policy would have substantive effect because it implements, interprets and prescribes FCC policy. *See* 5 U.S.C. §§ 551(4), 552(a)(1)(D); *GMC v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984).

³² 47 C.F.R. § 0.331. Even if the Bureau has such authority, the rule is still invalid because it was not adopted pursuant to the requirements of the APA due to the lack of notice and comment. 5 U.S.C. § 553(b). A court has held that the APA requires an agency to provide notice of a proposed rulemaking "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988).

still applies. The Bureau did not address Petitioners' claims that MCLM and PSI failed to provide the requisite coverage under Commission rules. Had it done so, it would have concluded that MCLM and PSI clearly did not comply with the coverage rules. Failure to comply with the coverage requirements renders MCLM's and PSI's licenses (system authorizations) invalid.³³ License holders are not permitted to retain invalid licenses and must turn them over to the Commission for cancellation.³⁴ In substance, this is the same result as automatic termination under Section 1.946(c).³⁵ As a result, regardless of whether the Bureau applied the standards under Section 1.946(c) or Section 80.49(a), the Bureau was obligated to conclude that PSI's and MCLM's AMTS system authorizations automatically terminated for failure to comply with applicable Commission rules.³⁶ In fact, the notice of automatic termination in the Commission's rules, both under Sections 1.946(c) and 80.49(a) is a mere ministerial reminder. Invalid licenses

³³ 47 C.F.R. § 80.475(a) (2001); 47 C.F.R. § 80.49(a)(3) (2001).

³⁴ 47 C.F.R. § 80.49(c) (2001).

³⁵ Moreover, even if Sections 1.955(a)(2) and Section 1.946(c) were not in effect at the relevant times, the construction-coverage-service deadline under Section 80.49 that applies to the system coverage-service requirement under Section 80.475(a) would trigger automatic termination. These ^{Part 1} rules were not new but were consolidations of existing rules in various wireless services. To find otherwise would mean that before the FCC adopted the final ULS rules, it had no means to police failures to meet the construction-coverage requirements, which simply is not the case. See First AMTS Order. Section 1.946(c) was in effect on February 12, 1999 before the construction-coverage-service deadline for the subject MCLM AMTS system authorization. See 63 FR 239 at 68904 (Dec. 14, 1998); See also Exhibit 3 to MCLM Request and Exhibit 3 to PSI Request.

³⁶ The Bureau attempts to find a disconnect between the language of Section 80.475(a), which imposes a coverage requirement on AMTS and Section 80.49(a)(3), which applies a construction requirement and imposes automatic termination for licenses failing to meet this obligation. Because Section 80.475(a) includes no specific language discussing the consequences for failure to meet the coverage requirement, the Bureau concludes that automatic termination is not appropriate. Section 80.49(a), however, simply identifies the consequences of holding an invalid license- automatic termination. Automatic termination is intended to apply to any radio license that fails to comply with the Commission's rules, not exclusively for failure to meet the construction requirement.

are always subject to cancellation/termination.³⁷ In this case, system continuity of coverage-service is the requirement under Section 80.475(a) created as the foundation of AMTS - the threshold requirement to obtain and maintain a license. Failure to meet this requirement renders the license invalid and subject to cancellation.

Section 80.49(a)(3)'s statement that stations not timely constructed become invalid and must be returned to the Commission for cancellation applies to the AMTS system authorization and component stations, for reasons given above.³⁸ If a station needed for the system coverage-service requirement is not timely constructed, then it and the rest of the system stations become invalid and must be returned for cancellation. In the instant case, the Requests demonstrated that even considering all of the stations (required ones, and any that may have been applied for under any theory of redundant coverage)³⁹, the system continuity of coverage-service requirement was

³⁷ License grants do not afford holders property rights in the licenses. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (“The policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.”); *Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems*, Report and Order and Further Notice of Proposed Rule Making and Fourth Memorandum Opinion and Order, 21 FCC Rcd. 8892, 8925-26 ¶ 46 (2006) (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), and finding that the Commission has consistently upheld the principle that no licensee obtains any vested interest in any frequency). Instead, the right to continue to hold the license is expressly conditioned on continued compliance with the license terms. *In the Matter of Morris Communications, Inc.*, 23 F.C.C.R. 3179, 3198 (2008) (“Commission licensees hold only those rights established by the terms and conditions of the licenses issued to them.”). Failure to comply renders the license void. *Id.*

³⁸ After the invalidation by action of law, the return for cancellation is for convenience of the FCC and others seeking access to the spectrum in the invalidated license. It is a proper duty to impose on the licensee that failed to timely meet the requirements of system construction and coverage-service. In this case, no such "return" notice to the FCC for cancellation is at issue, since Petitioners provided the notice to the FCC. But in any case, this "return" function is not required for the automatic termination action.

³⁹ A redundant station would include, for example, a station in a harbor with coverage that fits within an existing multi-station system's coverage, to provide for better signal levels, and higher data rates or various other forms of redundant coverage to improve quality, fill-in areas of weak signal, etc. The FCC defines coverage for AMTS site-based system authorizations as a certain

clearly not satisfied. Thus, the Requests should be granted and the system authorizations, and all component stations should be recognized as automatically terminated as of the deadline to meet the construction and coverage-service requirement.

The Bureau Erred in Failing to Provide a Reasoned Basis for its Decision

Under the APA, “In order to ensure that an agency’s decision has not been arbitrary...the agency [must] have identified and explained the reasoned basis for its decision.”⁴⁰ In this case, the Bureau has not provided a reasoned basis for its decision, and thus, its order does not satisfy the APA. The Bureau dedicates a single sentence in its order to the conclusion that continuity of service is not a coverage requirement for purposes of Section 1.946(c). The Bureau utterly fails to justify its position or to identify the basis for its conclusion. As a result, the Bureau’s decision cannot withstand scrutiny under the APA.

The Bureau Erred in Neglecting to Address Petitioners’ Arguments that MCLM and PSI, and Their System Authorizations, Failed to Meet Coverage Requirements Under Section 80.475(a)

As discussed above, continuity of service is a coverage requirement for purposes of Section 1.946(c). Thus, the Bureau erred in failing to consider the evidence presented by Petitioners demonstrating that MCLM and PSI did not meet the Commission’s coverage/continuity of service requirements for AMTS licensees, and as a result, the Commission must affirm that their licenses automatically terminated.⁴¹ Specifically, the Bureau ignored:

38 dBu signal level that the FCC determined is generally sufficient for acceptable quality. *See* Exhibit 1.

⁴⁰ *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996).

⁴¹ The Bureau properly exercised its authority to address Petitioners’ Requests, despite the pending evidentiary hearing as to MCLM in EB Docket No. 11-71 where the appointed

- PSI and MCLM filings with the Commission showing coverage gaps⁴²
- Engineering studies of PSI and MCLM stations in the Northeast corridor demonstrating coverage gaps⁴³
- Detailed analysis of the above documents to demonstrate the substantial coverage gaps in PSI's and MCLM's service in the Northeast corridor.⁴⁴

The Bureau completely disregarded each and every one of these crucial pieces of evidence supporting automatic termination of MCLM's and PSI's licenses. The Bureau erred in so doing, and must reconsider the Requests based upon a full review of the record.

The Bureau Acted in a Manner Contrary to the Public Interest

By ignoring the evidence presented by Petitioners that MCLM and PSI failed to comply with their coverage obligations, and as a result, were not providing continuous service in the Northeast corridor, the Bureau relinquished its obligations to the public interest. The Bureau maintains oversight over all licensees in order to ensure that spectrum is allocated in a manner

Administrative Law Judge is considering whether MCLM's stations were properly constructed. *See* Maritime Communications/Land Mobile, LLC, *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, EB Docket No. 11-71, 26 FCC Rcd. 6520, 6546 ¶ 61 (2011). Similarly, the Bureau is authorized to act upon any future request to find permanent discontinuance under Section 1.955(a)(3) and related FCC rulings. Referring a matter to the Enforcement Bureau or designating certain facts or issues for hearing does not deprive the WTB of its authority under Section 0.131. *See, e.g., In the Matter of Implementation of the Telecommunications Act of 1996*, 12 F.C.C.R. 22497, paras. 135-36 (1997); 47 C.F.R. §§ 0.131, 1.274. This matter must be decided upon as to PSI under Section 1.106. Since the same issues of fact and law are presented as to MCLM, this decision on reconsideration will also apply to MCLM. For this reason alone, the Bureau should decide on this Petition for Reconsideration as to both PSI and MCLM, and not defer action as to MCLM in consideration of the current Hearing noted above. In addition, the Bureau is the delegated authority over the instant AMTS matters. Only the Bureau has the extensive background knowledge needed to act upon this Petition.

⁴² *See* Exhibit 1 to PSI Request; Exhibit 1 to MCLM Request.

⁴³ *See* Exhibit 2 to PSI Request; Exhibit 1 to MCLM Request.

⁴⁴ *See* PSI Request at 4-13; MCLM Request at 7-14.

that benefits the public.⁴⁵ Petitioners' evidence clearly shows that MCLM and PSI have not provided the continuity of service the Commission intended when it established AMTS licensing. As a result, their continued ownership of the licenses is not in the public interest. By failing to find the licenses invalid and automatically terminated, the Bureau violated its duty to the public interest.

Petitioners demonstrated in the Requests why the Bureau should expeditiously grant the Requests, and find that the subject system authorizations automatically terminated (and thus will be canceled) for specific reasons, including since failing to do so would further the unlawful blocking by MCLM and PSI of Petitioners' business plans and specific spectrum transactions with public passenger railroads required for their public safety purposes. Those purposes are made clear by the railroads in FCC Docket No. 11-79, and those purposes could not more clearly be highly in the public interest, which the Commission is charged to protect and advance with regard to its licensing authority and decisions.

The Bureau's Order Violates Petitioners' Equal Protection Rights

Petitioners demonstrated and argued in the Requests the essential matters under this subheading, however, the Bureau failed to respond thereto in the Order. The Order erred for that lack of response. Petitioners further submit this matter in this petition for reconsideration.

The FCC and its Bureaus must treat similarly situated licensees in a similar manner.⁴⁶ To do otherwise would violate their rights of equal protection under the law.⁴⁷ Denial of equal

⁴⁵ 47 C.F.R. § 1.903; *See also* 47 C.F.R. § 90.173.

⁴⁶ *Windsor v. United States*, 833 F. Supp. 2d 394, 400 (S.D.N.Y. 2012) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("Equal protection requires the government to treat all similarly situated persons alike.")).

protection likewise violates the APA and cannot be upheld.⁴⁸ Despite equal protection mandates, the FCC has treated Petitioners more harshly than MCLM and PSI. By reading the consequences of failure to meet the coverage obligations of Section 80.475(a) out of the rules, the Bureau effectively imposed no coverage requirement on MCLM and PSI. In prior decisions, however, the Bureau strictly applied its coverage rules to Petitioners.

For example, the FCC applied Section 80.475(a) strictly to Havens, rejecting his attempt to obtain AMTS spectrum for service to inland waterways in Texas due to what the FCC found to be a very small lack, in total coverage shown, of the required full continuity of coverage-service.⁴⁹ The FCC applied the same to Havens in rejecting his applications for AMTS spectrum to service defined by the Army Corps of Engineers as the Arkansas Headwaters navigable waterway in Colorado.⁵⁰ MCLM's predecessor asserted, in both cases, that the FCC must reject the Havens applications for not fulfilling the Section 80.475(a) continuity of coverage-service.⁵¹ In the FCC order on reconsideration, maintaining the rejection of these applications, the FCC stated in response to Havens' allegation that the FCC was not applying this rule to any existing AMTS licensee (including PSI and MCLM's predecessor), that the rule must be applied, and that

⁴⁷ *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (Equal protection prohibits the government from drawing "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.").

⁴⁸ 5 U.S.C. § 706(2)(A); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003) (proscribing agency conduct that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

⁴⁹ See Exhibit 1.

⁵⁰ *Id.*

⁵¹ *Id.*

if the FCC is later shown a case of violation of the rule, it will act on it.⁵² Of course, the rule must be applied.⁵³

In sum, while the Bureau effectively refuses to apply a coverage rule to MCLM and PSI in the instant proceeding, it has stringently applied the same requirement to Petitioners in other matters. The FCC cannot interpret its rules in one way with respect to one party and differently as to another party.⁵⁴ Likewise, it cannot depart from existing precedent without a reasoned basis.⁵⁵ The Bureau has applied the coverage rules strictly to Petitioners, and by failing to apply the rules in the same manner to MCLM and PSI, the Bureau has deprived Petitioners of the equal protections of the law.

The Bureau Erred in Failing to Consider *Sua Sponte* Whether it Should Find Automatic Termination, and thus Cancel, MCLM's and PSI's AMTS Licenses (System Authorizations)

⁵² The Bureau has confirmed that “even if it were to learn of licensing actions which were inconsistent with the Commission’s Rules or stated policies, the appropriate course of action would be to consider whether it should take some action with respect to the affected license or licensee...” *In the Matter of Applications of Warren C. Havens for Automated Maritime Telecommunications System Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, and Leadville, Colorado*, Memorandum Opinion and Order, FCC 02-252, 17 FCC Rcd. 17527 at para. 6 (Rel. Sept. 18, 2002). In their Requests, Petitioners identified licensing actions inconsistent with Commission rules and implored the Bureau to take the promised action. The Bureau erred in failing to consider and find that continued licensure of MCLM’s and PSI’s stations is “inconsistent with the Commission’s Rules.” See MCLM Request at 17.

⁵³ The instant Order properly did not find that the rule was not effective due to any sort of forbearance, or effective waiver for PSI and MCLM. The Order also properly did not find that Petitioners’ factual presentation of lack of the required continuity of coverage-service was somehow time barred. (The records in AMTS licensing show that the FCC never considered, and certainly did not consider and accept, any showing or conduct at the FCC any showing that PSI or MCLM predecessors satisfied this continuity of coverage-service requirement).

⁵⁴ *Windsor v. United States*, 833 F. Supp. 2d 394, 400 (S.D.N.Y. 2012) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (“Equal protection requires the government to treat all similarly situated persons alike.”)).

⁵⁵ *Graphic Communications Int’l Union, Local 554 v. Salem–Gravure*, 843 F.2d 1490, 1493 (D.C.Cir.1988), cert. denied, 489 U.S. 1011 (1989).

Even assuming *arguendo* that the Bureau correctly found that PSI's and MCLM's licenses did not automatically terminate based upon failure to provide continuity of service, the Bureau still erred in failing to *sua sponte* consider the validity of the licenses. As discussed above, the Bureau is charged with ensuring that licenses are granted and maintained in the public interest. Through their Requests, Petitioners submitted substantial evidence, including engineering studies, indicating that MCLM and PSI had failed to provide overlapping coverage in the Northeast corridor during the relevant periods to keep their authorizations. The Bureau should have considered, on its own motion, whether PSI's and MCLM's continued ownership of the licensed stations furthers the public interest.⁵⁶ In other words, the Bureau should have treated the Requests as informal requests for Commission action to cancel the licenses, whether by virtue of automatic termination or by Commission action for failure to comply with FCC rules (in this case, coverage requirements). By failing to take action on the evidence presented, the Bureau abdicated its responsibilities to the public interest.⁵⁷

Request for Expedited Review

The Order does not take issue with Petitioners' assertion of the need for prompt action for reasons given in the Requests. Petitioners appreciate the relatively prompt action, and for the same reasons, they now request expedited action upon this Petition. Specifically, Petitioners request expedited action due to a number of pending requests submitted to Petitioners by several

⁵⁶ See, e.g., 47 U.S.C. § 316; 47 C.F.R. § 1.87(a) (authorizing the Commission to modify an existing license on its own motion); *In the Matter of Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Orbit Mobile Satellite Serv. Sys. in the 1.6/2.4 Ghz Bands*, 19 F.C.C.R. 13356, 13401 (2004).

⁵⁷ Petitioners recognize that by this order, they are not precluded from seeking a Commission finding that the stations were permanently discontinued, or that the licenses should otherwise be cancelled. However, Petitioners should not have to bear the expense of seeking further review of the validity of the licenses.

government-owned and operated railroads for geographic AMTS spectrum, by assignment or lease for use in new wireless systems to implement PTC (see also discussion above as to the spectrum transactions with railroads, and related matters). Petitioners cannot act on these requests until their spectrum is unencumbered by MCLM's and PSI's licenses. As a result, Petitioners respectfully request that the Bureau reconsider its order immediately.

Conclusion

For the foregoing reasons, Petitioners respectfully request that the Bureau promptly reconsider its denial of Petitioners' Requests for finding that MCLM's and PSI's AMTS licenses (system authorizations and component stations) automatically terminated for failure to meet the construction-coverage requirements by the deadlines therefor. If, for any reason, the Bureau finds that any factual assertion or argument or issue raised herein is not permissible in a petition for reconsideration under Section 1.106, then Petitioners request that such material be considered and responded to under Section 1.41. Petitioners note that Section 1.106 allows the Commission to decide upon a petition for reconsideration. Given the importance of this matter (involving much of the AMTS spectrum of the nation in major markets, and the important current needs for using the spectrum in the public interest), and the length of time that the core issues identified herein have taken place, it appears appropriate for the Commission to act upon this petition for reconsideration, or at minimum provide oversight to the Bureau, in this matter.

Respectfully submitted, August 15, 2012

/s/ Warren Havens [Submitted Electronically. Signature on File]

Warren Havens,

Individually and as President of each Petitioner:
Environmental LLC, Skybridge Spectrum Foundation, and
Intelligent Transportation & Monitoring Wireless LLC

2509 Stuart Street, Berkeley, CA 94705* Phone: 510-841-2220

* Skybridge Spectrum Foundation agrees to receive service at the above address for purpose of this proceeding.

Notice to Served Party and Served Potentially Interested Entities

Any responsive pleading to this instant pleading, to be served upon a party that has submitted and signed this pleading (listed above), must be served upon that party directly and separately from any other party or parties that signed this pleading. No party that signed this pleading, nor the officer who signed for said party, waives the right to be directly, timely, and otherwise lawfully served (including by use of the accurate party name, address, and any contact person as stated in this pleading).

The following items are referenced in this Petition's text above.

Underlining, other emphases and items in brackets added to quoted text below.

Also, arguments made below are an integral part of this Petition. This Exhibit 1 is referenced and fully incorporated into the text of this petition for reconsideration.

Part 1 below contains primarily an argument based upon cited FCC decisions.

Part 2 below contains primarily citations to and quotations from FCC decisions, with summary arguments added: some of the cited and quoted matter is also contained in the pleading text above: that is mostly shown by **gray shading** as to quoted matter. However, Petitioners keep that matter in this Exhibit with the other referenced material, as it provide a more consolidated presentation of these related authorities that support major positions set forth in this petition for reconsideration.

Part 1

The following expands upon the text at the end of footnote 34 of the pleading text above and related pleading text. In this part 1, "above" means in the pleading text above (unless otherwise stated).

With regard to MCLM, as described above, these system authorizations were for the multiple stations that constituted the system. The applications for these system stations that were granted are described in DA 96-738.[***] Since these rules, Section 1.946(c) (and the related rule 1.955(a)(2)), were in effect prior to the MCLM authorization, they apply in this case.

However, again, as shown above, Petitioners case does not require application of Sections 1.955(a)(2) and 1.946(c).

With regard to PSI, the effective date of the cited Part 1 rules, Section 1.946(c) (and the related rule 1.955(a)(2)), as shown, is after the construction deadline of the PSI AMTS system authorization (multiple call signs, but one system authorization) which was May 30, 1998.

With regard to PSI (as with MCLM), these system authorizations were for the multiple stations that constituted the system. The applications for these system stations that were granted are also described in DA 96-738. After grant of the subject PSI Atlantic Coast system authorization (following soon after the FCC decision denying petitions to deny its system application, DA 96-738) which had the above noted May 1998 construction-coverage deadline, PSI submitted a half dozen other applications that were granted, to attempt to meet or approach the required continuity of coverage-service under sec. 80.475(a) (the "Additional Stations").[****] In addition, PSI has been found by the FCC to have failed to maintain and show any evidence of construction (any construction, even apart from timely construction) of its alleged station in New York, New York (the "NY Station"), that was among its initial set of stations that resulted in grant of the subject Atlantic Coast system authorization, and that is described in FCC 98-234.[*****] Since PSI attempted by the "Additions Stations" and the NY Station to meet the required system continuity of coverage-service, and since the construction-coverage deadline for the Additional Stations was after the effective date of Sections 1.955(a)(2) and 1.946(c), these rules should be deemed to apply to the system authorization (all component stations), and for like reason, since PSI, by its own failures to maintain station records of the alleged NY Station and provide them to the FCC in a proceeding calling for them (or admit that the station was never constructed as the cause of having no records) has failed to even submit an effective statement of construction-coverage to this day, these to Part 1 rule sections should be deemed to apply to this station, and thus, to the system authorization that depended on this

station as a component station (it was not redundant in coverage in any way to any other station in the subject system authorization).

However, again, as shown above, Petitioners case does not require application of Sections 1.955(a)(2) and 1.946(c).

Part 1 Endnotes

[*] The original version of this rule incorrectly cited to 1.948(c): this was later corrected to state 1.946(c).

[**] FCC 98-234 is published in [63 FR 68934](http://fr.hallikainen.org/?vol=63&page=68934), Dec. 14, 1998. Copy at: <http://fr.hallikainen.org/?vol=63&page=68934>

[***] After grant of these authorizations, the FCC extended the construction-coverage-service deadlines to the dates noted above.

[****] As the system stations files show, three had a construction-coverage deadline of October 10, 2000 (stations in Maryland, South Carolina and Florida), and three others had a later construction-coverage deadline (stations in Massachusetts, Maryland and Florida).

[*****] The FCC is currently conducting a Section 308 (47 USC §308) investigation of this failure. Letter from Mr. Scot Stone of the FCC Wireless Bureau to PSI dated July 30, 2012 re WQA216. (Some of the Petitioners hereto are parties to this investigation: they were copied by the FCC on the Section 308 inquiry letter, since they are parties in underlying related restricted proceedings cited in the inquiry letter as the apparent cause of the inquiry.)

Part 2

1.a The Commission explained in FCC 00-370, 4th R&O and 3rd FNPRM:

n266 We note that AMTS stations are licensed only as part of a system, and that ordinarily each station is the subject of a separate application. ... That is, we will suspend processing of all of the applications for the proposed system if the non-mutually exclusive applications cannot be granted without the suspended mutually exclusive applications because the partial system would not provide the **required coverage**, see 47 C.F.R. § **80.475(a)**, or would otherwise not satisfy the technical requirements in our AMTS rules. ...

This reiterates what the Commission and Wireless Bureau in dozens of other decisions on “site-based” “incumbent” AMTS found, and as was the purpose in the creation of AMTS: it involved only licenses for a multi-station system for continuity of “coverage” under sec.

80.475(a), and this requirement was maintained and applied up to the suspension of licensing of these authorizations and component stations.

The above noted proposed exception for partition of a site-based multi-site system authorization (which was adopted eventually), was after the construction-coverage deadlines for the subject PSI and MCLM AMTS system authorizations.

1. Commission Second MO&O and 5th R&O, FCC 02-74 at paragraph 22, *17 FCC Rcd 6685, 67 FR 48560*, states:

AMTS licensees must provide continuity of service to either a substantial navigational area along a coastline; or sixty percent of one or more inland waterways, except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety, and waterways small enough to be served by a single station are not eligible for AMTS service.

2. At paragraph 32 of FCC 02-74, it is clear that the Commission equated continuity of service with real-life good-quality “service area” of all of the system authorization’s combined stations. A “service area” is the same as “coverage.” A “station” is a defined term in Part 80 rules: it means the actual physical installed-operated radio-communications station at a site.

32. We note that with respect to the 220-222 MHz band, which has many of the same physical characteristics as the AMTS band, the Commission determined that incumbents [stations (as used below)] should be protected to a 38 dBu service contour because it doubted that the signal strength beyond such a contour produces a quality of service deserving of protection. For that reason, we believe that requiring protection to a larger service contour, such as Mobex and PSI’s suggested 17 dBu contour, is unnecessary, and would reduce the area that could be served by geographic licensees [stations] without any corresponding protection to existing service. We disagree with Mobex and PSI when they argue that an incumbent’s service area should be protected at the level upon which its authorization was granted, because authorizations of incumbent AMTS stations were not granted upon a specific service contour, only upon a showing of continuity of service. Our own engineering analysis of incumbent systems that were designed⁵⁸ on the basis of a larger service contour, such as 17 dBu,

⁵⁸ It is clear in FCC records, and by the FOIA response noted below, that the what the FCC means here is not that they did engineer of constructed-operational stations (or even simply granted ones) to determine actual continuity of service, but that they did studies on coverage

demonstrates that the system's continuity of service will not be severed (i.e., that it will not be possible for a geographic licensee to interpose a facility between co-system incumbent stations) if the incumbent is protected to a 38 dBu service contour.^[*]

This also shows that AMTS licensees, not just applicants, had to provide continuity of coverage- service: an “incumbent” used here, means the named licensees, Mobex and PSI. Also, Single-site stations could not provide AMTS service: they did not provide continuity of service. (Many FCC Orders also state this, including one cited below.) Petitioners' instant 1.41 requests showed that the PSI and MCLM AMTS stations were single-site and did not provide continuity of service. Thus, MCLM and PSI could not turn on their stations because they were single-site, and as such, did not have continuity of service and thus never constituted an AMTS system providing AMTS service. Therefore, the MCLM and PSI single-site stations are *void ab initio* and should be cancelled, and even if constructed and turned on, it was not construction of an AMTS system.

3. “Continuity of service” implies and requires “coverage” since you cannot have service without coverage. § 80.475(a) talks about “each station” in a “proposed system”. The authorization was for a “system” not individual stations, and that is supported by multiple FCC decisions on AMTS, including the decision against the Havens TX and Arkansas Headwater applications. MCLM and PSI had to provide AMTS service, which obviously included coverage since there is no service without coverage.⁵⁹ Thus, if they did not meet the system coverage

(contours): that stations spaced using 17 dbu contours that overlap (which for AMTS has to be over the subject waterway, not over land) will not allow a geographic licensee to interpose a co-channel station within those overlapping contours, given the rule the FCC adopted that is subject of the above quotation: rule section 80.385(b).

[*] See preceding footnote.

⁵⁹ These decisions are within the decade-long proceeding currently subject of a petition for reconsideration of FCC 11-116 (a modified sanctions Order).

requirement, then the service was not provided and the system failed. Thus, MCLM and PSI never provided AMTS service since that service had to provide overlapping (“continuous”) coverage along a waterway. Thus, PSI and MCLM never constructed an AMTS system. Section 80.475(a) was in effect before grant of the AMTS incumbent Atlantic Coast stations and at the time of their construction deadlines.

4. The FCC's response to Intelligent Transportation & Monitoring Wireless LLC's FOIA request 2007-177 shows that the FCC did not actually conduct any engineering analysis of the AMTS incumbent licensees, and thus it has never previously determined whether or not the incumbents' provided continuity of service.

5. The “AMTS Freeze Order,” Fourth Report and Order and Third Further Notice of Proposed Rulemaking, FCC 00-370, *15 FCC Rcd* 22585, *65 FR* 76966, stated

At paragraph 16:

Proposal. Because an AMTS licensee must provide continuity of service to its service area, which entails a system of stations, we typically grant authorizations for each station in the system on the same date. Currently, AMTS stations must be placed in operation within eight months from when the license is granted, but licensees often have found eight months to be insufficient to construct an *entire system*, and have routinely requested additional time, up to two years. The Commission proposed in the Second Further Notice to extend the construction period to two years for each station within a new AMTS system and one year for subsequently licensed stations that extend an existing *system's* service area (a "*system extension*"), with no construction requirements for fill-in stations.

At paragraph 38:

Presently, each AMTS must provide continuity of service to either a substantial navigational area along a coastline or sixty percent of one or more inland waterways (except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety). This requirement reflects the original purpose of AMTS service, which was to authorize and provide radio frequencies for automated, interconnected marine communications systems that would provide commercial vessels moving along a waterway with more convenient service than was available from individual

public coast stations, by, e.g., relieving them from having to repeatedly change frequencies and contact new coast stations (which may have different call set-up and billing procedures).

At paragraph 36:

In turn, we propose to protect geographic area licensee operations by allowing each incumbent AMTS licensee to renew, transfer, assign, or modify its license only if the modifications **do not extend the system's service area ["coverage"]** or frequency assignment, as we have for incumbents using VHF public coast spectrum. Proposed modifications that would extend an AMTS incumbent's service area or request the use of additional frequencies would be contingent upon an agreement with each affected geographic area licensee.

At paragraph 10:

AMTS licensees must provide continuity of service to either a substantial navigational area along a coastline; or sixty percent of one or more inland waterways, except that a waterway less than 240 kilometers (150 miles) long must be served in its entirety, and waterways small enough to be served by a single station are **not** eligible for AMTS service [thus, not for an AMTS authorization].

And at footnote 144:

Expanding a system's contour over water only (disregarding uninhabited islands) shall not be deemed to extend the system's service area.

At paragraph 77:

We will continue to accept and process applications for such frequencies involving renewals, transfers, assignments, and modifications, and amendments to such applications, that propose neither to expand a station's (or AMTS system's) service area or to obtain additional spectrum.

6. Below are excerpts from 11/26/01 Email from Scot Stone to Warren Havens regarding Having to Meet Section 80.475(a) Requirements. Mr. Stone's Responses are denoted by [Scot Stone]. While this is informal staff advice, it is consistent with the applicable rules and Orders and other law, cited in the text above.

In a message dated 11/26/01 7:40:31 AM, SSTONE@fcc.gov writes:

Mr. Havens,
My responses are set out below.

>>> wchavens@aol.com 11/19/01 05:15PM >>>

Mr. Stone, in working on AMTS development plans, the following issues have arisen. I would appreciate your feedback on the following (specific questions indicated by "*"):

1. Disaggregation: Can you refer me to any existing rules applicable to disaggregation of a portion of the spectrum of an existing AMTS license? (I searched but couldn't find this addressed in the rules or Reports and Orders.) In this regard, in the Forth Report and Order it was decided that any channelization can be used (80.481). Thus, if disaggregation is allowed, there could be no issue of what channels may be disaggregated since channel size is up to the licensee.

* The question thus is-- is there any rule that explicitly, or as interpreted in any Order, prohibits or limits the transfer or assignment of some of the spectrum of an existing license? I would think this would be allowed as long as either or both the transferor or transferee of the disaggregated spectrum meets and maintains the continuity-of-coverage requirements. (See next.)

[Scot Stone] The Part 80 rules permit disaggregation only by VPC geographic licensees, but the issue of disaggregation by AMTS licensees (incumbents as well as geographic licensees, should geographic licensing be adopted) is under consideration in the pending 5th R&O in Docket No. 92-257. Thus, under the current rules, transfer or assignment of only a portion of an AMTS channel block would require a waiver.

2. Coverage Requirements for Construction and Operation (as opposed to applications): * This above brings up the question of whether the continuity-of-coverage requirements (60% or 100% for an inland waterway, and 100% of a defined coastal area) in 80.475(a) which explicitly applies to application, must be read to also impose the same coverage requirements on construction (to meet the construction deadline) and subsequent operations (to be considered kept in operation and not permanently discontinued). I would think so. It would make no sense to require proposed coverage in an application, but to not require it in actual construction and operation. (I ask this since, apart from 80.475(a), there does not seem to be another rule on coverage requirements for construction/operation.)

[Scot Stone]: I agree. A party that is licensed for enough stations to satisfy the coverage requirement but does not actually construct enough stations to satisfy the coverage requirement is not in compliance with the rules.

3. Geographic partitioning:

* Is there any rule or Order dealing with this for an existing AMTS license?

[Scot Stone] The Part 80 rules permit partitioning only by VPC geographic licensees, but the issue of partitioning by AMTS licensees (incumbents as well as geographic licensees, should geographic licensing be adopted) is under consideration in the pending 5th R&O in Docket No. 92-257. Thus, under the current rules, transfer or assignment of only a portion of an AMTS channel block would require a waiver.

7. MCLM itself plead before the FCC effectively in support of Petitioners' instant case in its Request for Review, in CC Docket 96045, filed January 2007 (Request for refund of fees allegedly paid by Watercomm and Mobex to the Universal Service Fund).

... At the times that the Payors obtained their AMTS licenses, the Commission's Rules narrowly limited the geographic areas within which service could be provided. Section 80.475(a) of the Commission's Rules required that

AMTS applicants proposing to serve inland waterways must show how the proposed system will provide continuity of service to along more than 60% of each one or more navigable inland waterways. Inland waterways of less than 240 kilometers (150 miles) must be served in their entirety. AMTS applicants proposing to serve portions of the Atlantic, Pacific, or Gulf of Mexico coastline must define a substantial area and show how the proposed system will provide continuity of service for it,

47 C.F.R. §80.475(a) (2001). []

In many instances, the Commission has refused to permit an AMTS applicant to obtain an authorization for service because the proposed service area did not meet the Commission's narrow requirements [stated above]. Those actions significantly restricted the class of eligible user.

In Fred Daniel d/b/a Orion Telecom (Orion), the Commission determined that not only could an AMTS system not be authorized for coverage over only land but that many eligible persons in communities, including Denver, Colorado; Henderson, Nevada; Yuma, Phoenix, and Tucson, Arizona; and El Paso, Ft. Worth, and Dallas, Texas could not obtain AMTS service because only one coast station would have been required for each community, 14 FCC Rcd 19912 (1999). The Commission also indicated in Orion that its original intent in allocating spectrum to AMTS was to allow a system to serve only the Mississippi River and the Gulf Intracoastal Waterway. In Warren Havens, 16 FCC Rcd 2539 (WTB 2001), the Commission's restrictive Rules [§80.475(a) cited above] prevented an AMTS applicant from providing AMTS service to eligible persons in Dallas, Austin, and San Antonio, Texas.

8. In DA 10-664, the Wireless Bureau upheld a denial of a declaratory ruling request

by MCLM, which included:

17. See Letter Ruling, 24 FCC Rcd at 4135, citing Amendment of the Commission's Rules Concerning Maritime Communications, Second Memorandum Opinion and Order and Fifth Report and Order, PR Docket No. 92-257, 17 FCC Rcd 6685, 6700 ¶ 31 (2002) (AMTS 5th R&O) ("AMTS geographic licensees should adhere to the co-channel interference protection standard that is used in the adjacent 220-222 MHz band"), on recon., Third Memorandum Opinion and Order, 18 FCC Rcd 24391 (2003). MC/LM argues that the paragraph cited by the Division, read in its entirety, reflects that the Commission's concern was to protect incumbent licensees from geographic licensees, and not vice versa, and therefore "supports MC/LM's position." See MC/LM Petition at 6. That both Section 80.385(b)(1) and the cited paragraph address a concern over interference from geographic licensees to site-based incumbents is evident, and the Division suggested nothing to the contrary. MC/LM infers, from the Commission's statement in the referenced paragraph that incumbent licensees should be permitted to operate under the terms of their current licenses, an intent to protect incumbents on the basis of an ERP of one thousand watts. Id. at 7. We conclude, however, that the Commission's concern was to avoid disruption of existing AMTS service, rather than to indefinitely preserve an incumbent licensee's ability to expand its facilities to the maximum permitted ERP. See AMTS 5th R&O, 17 FCC Rcd at 6699 ¶ 31 ("allowing incumbent licensees to continue operating under the terms of their current station licenses will further the public interest by avoiding interruption of the services they provide"), 6701 ¶ 34 (prohibiting incumbents from modifying their licenses in any manner that extends the service area).

The "existing service" under the "licenses...service area" is under grant of a system authorization to provide continuity of coverage-service under sec. 80.475(a). The "disruption" consideration at issue, shown in the proceedings resulting in the decisions cited above, is whether the continuity of coverage-service may be disrupted by co-channel geographic license stations if they are within a certain dBu-contour distance of the system coverage (of any system component stations coverage in the required continuity of coverage).

9. In FCC 07-87, the Commission explained:

See Third Memorandum Opinion and Order, 18 FCC Rcd at 24400- 01 P 23 n.84 (explaining that "the Commission eliminated the continuity of service requirement [in] the *Fifth Report and Order*," through the amendment therein of Section 80.475(a), and that the Commission's intention to eliminate the continuity of service requirement is further evidenced by the fact that the Commission there "did not require incumbent AMTS licensees seeking to partition spectrum to

maintain any minimum area of coverage, or otherwise condition approval of partitioning requests on continued conformance with former Section 80.475(a)"); *see also* 47 C.F.R. § 80.60(a)(2).

This equates (as is obviously the case without exception) “service” (and thus continuity of service) with “coverage” (and thus continuity of coverage). There are dozens of other AMTS Orders that explicitly state the same as to this sec. 80.475(a): the “service” described and required is the same as “coverage.” There is no end-user service without radio-system coverage that is the vehicle for the service. This does not need explaining but for language in the subject Order that suggests that this “service” is different from “coverage.”

End of Exhibit 1.

Declaration

I, Warren Havens, hereby declare, under penalty of perjury, that the foregoing Petition for Reconsideration and Section 1.41 Request, including Exhibits and Attachments, was prepared pursuant to my direction and control and that all the factual statements and representations of which I have direct knowledge contained herein are true and correct. This Declaration was on executed August 15, 2012.

/s/ Warren Havens

[Submitted Electronically. Signature on File]

Warren Havens

Certificate of Service

I, Warren Havens, certify that on this 15th day of August 2012, I caused to be served by placing into the USPS mail system with first- class postage affixed, unless otherwise noted, a copy of the foregoing Petition for Reconsideration and Section 1.41 Request, including attachments and exhibits, to the following:

Robert J. Keller
Law Offices of Robert J. Keller, P.C.
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Washington, DC 20033
Counsel of record of MCLM Debtor in Possession (“DIP”)

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Asserted counsel of MLCM DIP⁶⁰

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Counsel of Paging Systems, Inc. (PSI)

Michael Hayford, Officer and representaive
Pinnacle Wireless, Inc.
80 Commerce Way
Hackensack, NJ 07474

/s/ Warren Havens [Submitted Electronically. Signature on File]

Warren Havens

Certificate End Notes

(i) Petitioners are distinct entities under structure and substance, and applicable State law, as the Commission has recognized. Petitioners reserve the right to submit separate pleadings in this matter in the future.

1. The mailed copy being placed into a USPS drop-box today may be after business hours and therefore may not be processed by the USPS until the next business day.

⁶⁰ See certificate end notes.

2. By including above persons other than counsel of record of MCLM-DIP and PSI, Petitioners do not take the position that they have to be served, or that they or the entity that purport to represent are parties with legal standing in this matter.

3. MCLM-DIP has in the past objected to Petitioners serving other entities with interests in the subject MCLM-DIP spectrum, but at the same time attempts to object to Petitioners filings on any procedural basis possible.

4. Petitioners believe they may appropriately serve a potentially interested entity, Pinnacle Wireless. Pinnacle can inform Petitioners if it chooses not to be further served. Petitioners reserve the right to not continue service upon Pinnacle, in future pleadings in this proceeding. If MCLM expresses a current objection to Pinnacle being served, it should state good cause for the objection and serve the statement on Pinnacle and Petitioners.

5. Mr. Brown asserts that he is counsel to MCLM DIP but has not been approved as such by the US Bankruptcy Court with jurisdiction over MCLM DIP, and he is not counsel of record of MCLM DIP as reflected in the MCLM DIP FCC licensing records on ULS. Further, he currently asserts in some Bureau proceedings that he is, at the same time, counsel to MCLM (as opposed to MCLM DIP) which suggests that MCLM is unlawfully operating outside of the bankruptcy proceeding, with his counsel and by his actions. In addition, MCLM DIP does not have a right to receive service by service to more than one legal counsel. Also, Mr. Keller has not informed Petitioners that any attorney other than himself represents MCLM DIP or should replace him as the person to be served for MCLM DIP. Petitioners reserve the right to delete Mr. Brown from further service in this proceeding.

6. Mr. Keller has represented in FCC proceeding under FCC 11-64, docket 11-71, that as counsel to MCLM DIP he is barred for various reasons from any direct exchanges with Warren Havens, and may only deal an attorney at law that represents Mr. Havens or any company Mr. Havens serves as President or other authorized representative position. If Mr. Keller responds for MCLM DIP to this pleading, Petitioners reserve the right to challenge the response, citing the just-noted representation and documenting it (and on other grounds that may exist).

- End of Certificate of Service.